R.D. # 0011-99
Matawan, New Jersey

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

MADISON CENTER GENESIS ELDER CARE, INC. [1]	
Employer	
and	CASE NO. 22-RC-11729
COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1040, AFL-CIO	
Petitioner	

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding[2], the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[3]

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[1] The name of the Employer appears as amended at the hearing.
[2] Briefs filed by the parties have been duly considered.
[3] The Employer was not allowed to litigate the adequacy of the showing of interest submitted in support of the petition. The sufficiency of the Petitioner's showing of interest is an administrative matter not subject

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[4]

3. The labor organization involved claims to represent certain employees of the Employer.[5]

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act for the reasons described *infra*:

> All full time and regular part time registered nurses employed by the Employer at its Matawan, New Jersey facility, excluding director of nursing, assistant director of nursing, clinical coordinators, MDS coordinators, clinical reimbursement coordinators, nurse supervisors, managers, administrators, confidential employees, office clerical employees, guards and supervisors as defined in the Act.[6]

The Employer operates a nursing home in Matawan, New Jersey (herein facility or Madison) which provides residence and patient care twenty four hours a day, seven days a week. The Employer employs an Administrator, a Director of Nursing and two Assistant Directors of Nursing. Below these managerial positions at Madison are clinical coordinators, clinical reimbursement coordinators, MDS coordinators, and nurse supervisors. The parties agree that these aforementioned employees are supervisors

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to litigation. *O.D. Jennings and Company, 68 NLRB 516 (1946).* I am administratively satisfied that the Petitioner's showing of interest is adequate.

[4] The Employer is a New Jersey Corporation engaged in the operation of a nursing home in Matawan, New Jersey.

[5] The parties stipulated and, I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

[6] There are approximately 24 employees in the unit.

within the meaning of the Act, and should be excluded from the unit. The Employer also employs licensed practical nurses (LPNs), certified nursing assistants (CNAs) and registered nurses (RNs). The Petitioner is the current collective bargaining representative for the CNAs and LPNs employed at the facility. The Petitioner now seeks to represent all full-time and regular part-time registered nurses employed at the facility. The Employer, contrary to the Petitioner, asserts that they are supervisors within the meaning of Section 2(11) of the Act, and thus the petition should be dismissed.

There are approximately 24 RNs employed at the Madison facility. The RNs' primary duties involve ensuring that a group of patients in a unit receive proper care. This involves assessing patients' needs and making sure that those needs are met, performing direct patient care, and monitoring the patient care provided by the CNAs and LPNs. In this regard, the RNs administer medication, IV therapies and other treatments to patients. The LPNs' duties are very similar to those of the RNs with the exception of not administering certain IV therapies. The CNAs' duties consist primarily of assisting each patient in the patient's day to day life activities at the nursing home. Much of the CNAs' work involves feeding, washing, changing and dressing patients.

The Madison facility is divided into four wings. Wings A and B are reserved for long-term rehabilitative care, while wings C and D are reserved for subacute Medicare patients. The record reveals that during the 7:00 a.m. - 3:30 p.m. shift, wings A and B are each staffed with three LPNs and six or seven CNAs . Wing C is staffed with two teams, each team consisting of one RN charge nurse, one RN team leader, one LPN and approximately four CNAs. Wing D is staffed with one RN and one CNA. During the next shift (3:00 p.m. - 11:30 p.m.), wings A and B are each staffed with two LPNs and roughly five CNAs. Wing C is staffed with one RN charge nurse, four RNs and/or LPNs

and approximately six CNAs, and wing D is staffed with one RN. During the third shift (11:00 p.m. – 7:30 a.m.), wing A is staffed with one RN and four CNAS. Wing B is staffed with one LPN and four CNAs. Wing C is staffed with two RNs and five CNAs, and wing D is staffed with one RN.

The record reveals that RNs at the Madison facility either work as charge nurses or team leaders. RNs do not have the authority to hire, promote, transfer, suspend, discharge, layoff or recall employees, or adjust their grievances. In fact, all terms and conditions of employment for LPNs and CNAs are governed by their respective collective bargaining agreement. The Employer asserts that RNs are involved in the disciplinary process. In this regard, the only evidence presented by the Employer in support of this contention was limited to testimony that RNs have the authority to prepare employee notice of unsatisfactory conduct forms when a CNA or LPN has not performed a job properly. The Employer however produced examples of only two RN charge nurses who actually exercised this authority. The Employer asserts that the RNs make recommendations regarding particular discipline on these forms and are involved in the decision as to whether to discipline an employee. However, Deborah Sousa, RN charge nurse, testified that she prepares the unsatisfactory forms, alerts her supervisor of the situation and then the supervisor decides what discipline, if any, the employee will receive. While it appears that the RNs have the authority to informally counsel employees, they do not have the authority to issue formal discipline such as a suspension or discharge.

The RNs are not involved in granting LPNs or CNAs' requests to take a vacation or a day off. Moreover, RNs are not involved in preparing the monthly schedule which determines the days and shifts that LPNs and CNAs are assigned to work. That schedule

is prepared by the staffing coordinator. If employees want to change a shift, they must complete a request form and submit it to the staffing coordinator who makes the ultimate decision. RNs are however responsible for daily scheduling (i.e., who goes to lunch or breaks at certain times). The record also establishes that RN charge nurses assign staff to the medical carts, each cart containing the medications and treatments for patients. The record reveals however that the same RNs, LPNs and CNAs are assigned to the same cart and rooms on a daily basis, which ensures continuity of care for the patients. The Employer maintains that the RNs have the authority to change these assignments; however the record establishes that only one charge nurse, Deborah Sousa, has ever exercised this authority to reassign staff to different patients and or medical carts. The record is unclear as to the frequency of Sousa's involvement in such reassignments.

There is one charge nurse for each wing for each shift. Charge nurses can be either a LPN or RN. Currently, the charge nurses in wings A & B are LPNs, and the charge nurses in wings C & D are RNs. The Administrator, Judith Nixon, testified that RN charge nurses and RN team leaders prepare evaluations for probationary employees. In this regard, the RNs make recommendations as to whether or not probationary employees should be retained. The DON reviews the RNs' evaluations and either adopts or rejects the RNs recommendations regarding probationary employees. Nixon testified that the DON follows the RNs' recommendations 99.9% of the time. While the Employer makes a blanket statement that RNs prepare evaluations for probationary employees, the evidence in the record only supports the claim that one RN charge nurse, Deborah Sousa, has exercised this authority on two occasions. Nixon also testified that RN team leaders and charge nurses evaluate LPNs and CNAs for their annual appraisal, identify areas of weaknesses and strength and make recommendations as to merit

increases in pay. These evaluations are then reviewed by the RN charge nurse and ultimately by the DON. Nixon testifies that the DON follows these recommendations regarding merit increases 99.9% of the time. Similarly, the RN charge nurses evaluate LPNs, CNAs, and RN team leaders' performance and make recommendations regarding merit increases to the DON, who according to Nixon, follows the recommendation 99.9% of the time. Here again however, the Employer produced evidence to establish that only one charge nurse, Deborah Sousa, has actually evaluated other employees performance. However, the record is unclear as to whether or not these were effective recommendations; that is, there was no evidence to establish that the individuals for whom Sousa recommended that they receive a merit increase, actually received the increase.

The definition of a supervisor is set forth in Section 2(11), included by Congress as part of the 1947 Labor Management Relations Act. It defines a statutory supervisor as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In *NLRB v. Health Care & Retirement Corp*., 114 S.Ct. 1778 (1994), the Supreme Court considered a case involving the statutory definition of a supervisor in the health care field. The Court noted that it was deciding "the narrow question" of whether the Board's test for determining if a nurse is a supervisor is consistent with the definition set forth in Section 2(11), specifically, the phrase "in the interest of the employer." 114 S.Ct. at 1780. The Court rejected the Board's interpretation that a nurse's supervisory duties

are not exercised in the interest of the employer if incidental to the treatment of patients, stating that the Board created "a false dichotomy - in this case, the dichotomy between acts taken in connection with patient care and acts taken in the interest of the employer." 114 S.Ct. at 1782. The Court's holding was limited to a rejection of the Board's dichotomy between "interest of the employer" and "interest of the patient."

The Court, however, made clear that an examination of the duties of professionals to determine whether one or more of the Section 2(11) supervisory indicia is performed in such a way that the employees become statutory supervisors "is, of course, part of the Board's routine and proper adjudicative function. In cases involving nurses, that inquiry no doubt could lead the Board in some cases to conclude that supervisory status has not been demonstrated." *Id.* at 1785. In response to the argument that such phrases in Section 2(11) as "independent judgment" and "responsibly to direct" are ambiguous, and that the Board needs ample room to apply them to different categories of employees, the Court stated: "[t]hat is no doubt true, but it is irrelevant in this particular case, because the interpretation of those phrases is not the underpinning of the Board's test. The Board instead has placed exclusive reliance on the 'in the interest of the employer' language in Section 2(11)." *Id*. at 1782. The Court specifically noted that in applying Section 2(11) in other industries, without implicating the statutory phrase "in the interest of the employer," the Board occasionally has reached results "reflecting a distinction between authority arising from professional knowledge and authority encompassing front-line management prerogatives." *Id*. at 1785.

Section 2(11) of the Act is essentially the bill drafted in 1947 by the Senate Committee on Labor and Public Welfare, which sought to overturn *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947), by treating supervisors as "management" and thus

removing them from the protection of the NLRA. The Senate Committee Report accompanying the bill explained that:

> In framing this definition, the committee exercised great care, desiring that the employees herein excluded from coverage of the act be truly supervisory.
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> In drawing an amendment to meet this situation, the committee has not been unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion in that act. *It has therefore distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action. In other words the committee adopted the test which the Board itself has made in numerous cases when it has permitted certain categories of supervisory employees to be included in the same bargaining unit with the rank and file. (Bethlehem Steel Company, Sparrows Point Division*, 65 N.L.R.B 284 ... *Pittsburgh Equitable Meter Company*, 61 N.L.R.B. 880... *Richards Chemical Works*, 65 N.L.R.B. 14... *Endicott Johnson*, 67 N.L.R.B. 1342, 1347...) 1 Leg. Hist. at 410, 425 [emphasis supplied].

Since 1947, the Board's application of Section 2(11) outside the health care industry did not reflect any change in approach from its previous determinations of supervisory status. In a variety of industrial settings, the Board and the courts have construed the phrase "responsibly to direct" to reflect the distinction between true foremen and straw bosses or leadmen. See *Southern Bleachery & Print Works, Inc.*, 115 NLRB 787, 791 (1956) (machine printers "exercised an authority which the average rank-and-file employee does not possess," but were not supervisors, because it "is not the authority responsibly to direct other employees *which flows from management and tends to identify or associate a worker with management*" but rather "derives from their working skill and from their responsibility for the operation of a complex machine which requires a 7-year apprenticeship to achieve") (emphasis added), enforced, 257 F.2d 235,

239 (4th Cir. 1958) (relevant inquiry is "whether the individual is merely a superior workman or lead man who exercises the control of a skilled worker over less capable employees, or is a supervisor who shares the power of management"), cert. denied, 359 U.S. 911 (1959); *Ross Porta-Plant, Inc. v. NLRB*, 404 F.2d 1180, 1182 (5th Cir. 1968) (requiring "the type of authority which flows from management and tends to associate an individual with management"); *NLRB v. Security Guard Service*, 384 F.2d 143, 149 (5th Cir. 1967) (requiring "[s]ome kinship to management, some empathic relationship between employer and employee * * * before the latter becomes a supervisor for the former"); *see The Austin Co*., 77 NLRB 938, 942-43 (1948)(Mechanical Assistant, Electrical Assistant, and two Assistant District Estimators who directed approximately three to four employees each, found to be "no more than group leaders," not supervisors, although they had authority to "assign and guide work of their professional colleagues" and "make recommendations concerning [subordinates'] employment status," where recommendations as to dismissal and discipline "may come from anyone familiar with the facts...whether or not [they] happened to be the head of a department."]. Additionally, sporadic exercise of Section 2(11) authority, including responsible direction or assignment of work is insufficient to make leadmen or straw bosses supervisors. *See U.S. Gypsum Co*., 79 NLRB 48 (1948) (working foreman who has authority to discharge, hire, or promote only when the shift foreman is ill or on vacation is not a supervisor since "the occasional and sporadic exercise of supervisory powers is not sufficient basis on which to exclude an employee from a unit").

The Board has also applied the foregoing principles to professional employees. For example, in *Golden West Broadcasters-KTLA*, 215 NLRB 760, 761-62 (1974), television directors who gave instructions that were artistic in nature, or were necessary for the proper performance of work for which they were professionally responsible, did not responsibly direct other crew members, and were not supervisors where they could only hire in emergency situations. In *Marymount College*, 280 NLRB 486, 489 (1986),

librarians who were generally responsible for the flow of work were not supervisors of technicians, who generally worked independently, although librarians exercised such arguably supervisory duties as assigning non-routine tasks. Additionally, in *Neighborhood Legal Services*, 236 NLRB 1269, 1271 (1978), the employer established units which handled cases in specific legal specialties, and the "unit head" concept evolved from weekly unit meetings "at which problems encountered by individuals within a unit in handling particular cases were discussed, feedback or support from other unit members was obtained, and a consensus on how to best handle problems was arrived at." Attorney "unit heads" were not supervisors because training, assignment and direction of legal assistants and paralegals were merely incidental to their responsibilities as attorneys, unit heads were just conduits of information, and were responsible for the paralegals and legal assistants' work since these employees were non-attorneys. *Id*. at 1272-73. In *National Broadcasting Co*., 160 NLRB 1440, 1441-2 (1966), deskmen were not supervisors even though they had final responsibility for programming and could reassign and call-in off-duty newsmen, since those tasks "fall within the scope of the news writing craft or profession," and reassigning employees to other stories is "part of the group or team effort" required for professionally prepared news program under employer standards. See also *Wurster, Bernardi & Emmons*, 192 NLRB 1049 (1971) (where work on projects is organized on a team basis, several employees may work under direction of "project architect", and seventy five percent of the architects have performed these duties on different projects, architects not supervisors even though they directed others because roles are not constant, changed depending on the project, and architects direct "in a professional sense and related only to a particular project").

Finally, only if it is found that an individual exercises one or more of the indicia of supervisory status is it necessary to determine whether the exercise was accompanied by independent judgment. In this regard, it is important to distinguish the use of the term "judgment" in the definition of a professional in Section 2(12)(a) from the use of the term

"independent judgment" in Section 2(11). That is, the fact that a professional employee, by definition, exercises "discretion and judgment" does not mean that he or she necessarily exercises independent judgment in the 2(11) sense. A professional may be capable of exercising judgment, but nevertheless, by virtue of operating under instructions or routines, may not, in fact, exercise independent judgment in assigning or directing work.

Thus, in *Sav-On Drugs*, 243 NLRB 859, 861-62 (1979), enfd. 709 F.2d 536 (9th Cir. 1983), pharmacy managers who had responsibility for inventory control functions, including ordering drugs and merchandise to maintain inventory levels established pursuant to detailed guidelines, making out pharmacist schedules pursuant to the employer's "narrowly drawn guidelines requiring equal rotation of hours and days off," and authorizing overtime without prior managerial consent in unusual circumstances without also being able to order individuals to work, were found not to be supervisors. The Board also noted that these managers were the most experienced pharmacists in the stores, only directed non-unit clerks to a limited extent, and another pharmacist "in charge" had to be on duty in their absence.

In applying these principles to this matter, I find that the RNs at issue are not supervisors under the Act. I note that there is no evidence that the nurses have the authority to discharge, suspend, layoff or recall employees or to adjust their grievances.

A considerable amount of testimony was presented by the Employer regarding the RNs' responsibility for performing evaluations of the LPNs and CNAs as evidence of a supervisory role. However, this role in evaluating employees does not confer supervisory status in the absence of evidence that the evaluations constitute effective recommendations for promotions, wage increases, or discipline. *Arizona Public Service Co.,* 310 NLRB 477, 481 (1993); *Passavant Health Center*, 284 NLRB 887, 891 (1987).

As previously noted the Employer only established that one charge nurse, Sousa, has actually exercised this authority to evaluate employees, and there is no evidence to discern whether or not Sousa's recommendations regarding merit increases were in fact followed.

Additionally, the Employer asserts that RNs perform "probationary evaluations" at the end of a new employee's first ninety days of employment which are considered in the decision whether to continue that employee's employment. Here again however, the Employer's evidence reveals that only Sousa has actually evaluated a probationary employee. The fact that management seeks advice as to the potential of prospective employees from current members of its own complement is not itself sufficient to confer supervisory status. *Polynesian Hospitality Tours*, 297 NLRB 228, ALJD at 234 (1989).

Further, contrary to the Employer's assertion, the record also reveals that the RNs do not have the authority to issue any serious discipline to other staff. Although the Employer claims that RNs can issue oral or written warnings, these appear to happen on such an infrequent basis as to render them anomalous. The fact that a RN can report an employee's not performing his or her work properly to the DON or other supervisor is merely a reporting function and does not establish supervisory status, especially where, as here, the supervisor then makes her own investigation of the event and decides what to do. *Express Messenger Systems*, 301 NLRB 651, 653-654 (1991). A considerable amount of time was used at the hearing to make the point that when a RN issues a written warning to an aide, it is apparently never altered by management. Some of those warnings have been presented as exhibits, and obviously, the RNs do give such warnings. Yet, the record is devoid of any serious indication that these warnings, which may or may

not be considered in the decision whether to keep or promote an employee, play any role in the discipline and/or termination of employees.

Significantly, the limitations on the authority of the RNs is illustrated by the fact that RNs do not prepare their own or other employee's schedules, are not authorized to schedule employee overtime, and that employees do not obtain from RNs permission to take vacations, to take a sick day, or even to leave early in the event of sickness or an emergency. Further, with management of the Employer comprising an Administrator, DON, two ADON, nursing supervisors for each shift, subacute clinical coordinator, and MDS coordinator, it is apparent that the Employer has an adequate supervisory presence at the nursing home.

The Employer also presented evidence concerning the authority of RNs to assign or direct CNAs and LPNs to perform certain tasks. However, these assignments are predominantly of a routine nature as they involve work such as cleaning and feeding patients, taking vital signs, or giving patients their medications, all assignments which are performed day after day by the staff on the unit. This direction by the RNs appears to be no more than a routine exercise in which independent judgment is not required. The assignments at issue are not characteristic of those of "supervisors who share management's power or have some relationship or identification with management," but rather, are in the nature of "skilled nonsupervisory employees whose direction of other employees reflects their superior training, experience or skills." *Providence Hospital*, 320 NLRB 717, 729 (1996).

Moreover, the fact that RNs may give directions to LPNs and/or CNAs in the course of providing patient care illustrates that they are professionals such as the television directors in *Golden West Broadcasters-KTLA*, *supra*, attorney unit heads in

Neighborhood Legal Services, *supra*, or deskmen in *National Broadcasting Co*., *supra*, a classification of employees which Congress specifically recognized in Section 2(12)(a) are subject to the protection of the Act. Further, the tasks of the instant RNs in giving direction to other staff appear to be akin to leadmen in an industrial setting, a classification of employees which the legislative history indicates Congress did not intend to be considered supervisors.

While Respondent relies on several cases in which the Board has found RNs to be statutory supervisors, based on the evidence proffered at the hearing, the employer failed to meet its burden of proof that the RNs in the instant matter are statutory supervisors. In sum, therefore, I have concluded that the registered nurses herein are not supervisors under the Act and that the appropriate bargaining unit includes all full-time and regular part-time registered nurses.

Based upon the above and the record as a whole, I find that the evidence is inconclusive as to Sousa's supervisory status. In this regard, she appears to have exercised her authority in evaluating probationary employees as well as evaluating employee's annual performance. However, the Employer's assertions regarding the effect of Sousa's recommendations with regard to employees' evaluations are not supported by direct and probative evidence. Additionally, there is limited testimony which establishes that she has some control over staff assignments. In these circumstances, noting that the record is unclear regarding Sousa's alleged supervisory status, I will allow Deborah Sousa to vote in the election directed herein, subject to challenge. *St. Elizabeth Community Hospital, 237 NLRB 849 (1978); Cf. Barre-National, Inc., 316 NLRB 877 (1995).*

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the voting groups found appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the voting groups who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained the status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **Communication Workers of America, Local 1040, AFL-CIO**.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).* Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility

list containing the full names and addresses of all the eligible voters in the voting groups found appropriate above shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. *North Macon Health Care Facility, 315 NLRB 359 (1994).* In order to be timely filed, such list must be received in the NLRB Region 22, 20 Washington Place, Fifth Floor, Newark, New Jersey 07102, on or before May 27, 1999. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by June 3, 1999.

Signed at Newark, New Jersey this 20th day of May 1999.

_/s/ William A. Pascarell

William A. Pascarell, Regional Director
NLRB Region 22
20 Washington Place
Fifth Floor
Newark, New Jersey 07102

177-8560
324-2000